# Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S22–388 OF 2010
AZIZUL AZMI JC
25 FEBRUARY 2016

*Evidence — Documentary evidence — Admissibility of — Whether computer-generated documents inadmissible if certificate under s 90A(2) of the Evidence Act 1950 not produced and no testimony called to establish documents were produced in course of ordinary use of computers that generated them — Whether documents could be admitted if makers were called or if other established exceptions to hearsay rule applied — Whether s 90C of the Act did not mean computer-generated documents could only be admitted under s 90A — Whether documents that did not comply with s 90A could still be admitted under other relevant provisions of the Evidence Act 1950*

The defendant recruited, employed and managed foreign workers. It hired the plaintiff to procure contracts from companies which required foreign workers. In return, the plaintiff was paid a percentage of profits earned so long as the client introduced by the plaintiff remained a client of the defendant. The plaintiff later became an employee of the defendant and during the course of his employment discovered that the defendant had not paid him for some profits that were due to him under their previous arrangement ('the original agreement'). The plaintiff filed the instant suit claiming for RM1,027,302 in respect of business he had procured for the defendant from Texas Instruments Malaysia Bhd ('Texas Instruments'), RM186,462 in respect of business he had procured from STATS ChipPAC Malaysia Sdn Bhd ('STATS ChipPAC') and RM304,435 in respect of Advanced Micro Devices Export Sdn Bhd ('AMD'). At the trial, the plaintiff sought to adduce evidence of foreign-worker supply agreements between the defendant and the three companies in question, documents showing the number of workers the defendant had supplied, invoices issued by the defendant and documents showing the costs and expenses the defendant had incurred in supplying workers to the said companies. Some of the documents relied upon were computer-generated and the issue arose whether they were admissible as no certificate under s 90A(2) of the Evidence Act 1950 ('the Act') was tendered at trial, nor was testimony called to establish that the documents in question were produced in the course of the ordinary use of the computers that generated them.

**Held,** allowing only the claim in respect of AMD and ordering the defendant to pay the plaintiff RM151,418.80 with interest thereon at 5%pa from 1

January 2009 till date of judgment and thereafter with post-judgment interest until date of full settlement:

(1) The plaintiff was only able to prove documents that related to profits made in connection with the supply of foreign workers to AMD but not in respect of Texas Instruments or STATS ChipPAC. Since he had proven his claim for RM304,435 in respect of AMD but had acknowledged receiving RM153,016.20 from the defendant, judgment was given for the balance (see paras 8, 15–16 & 40).

(2) Based on the authority of the Court of Appeal's decision in *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317 and the Federal Court's decision in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617, the computer-generated documents sought to be relied upon by the plaintiff were admissible even where the requirements of s 90A of the Evidence Act 1950 ('the Act') had not been complied with, provided the makers of the documents were called or provided such documents were admissible under any other established exception to the rule against hearsay. In this case, the fact in issue was whether the defendant had received from AMD the amounts stated in their invoices. It was not disputed that the defendants or its agents authored the invoices. As such, the invoices amounted to an admission under s 17(1) of the Act that the defendant had invoiced AMD the sums stated in the invoices. Under s 21 of that Act, an admission was relevant and provable against its maker (see paras 19, 36 & 39(c)).

(3) Section 90C of the Evidence Act 1950 could not be read to mean computer-generated evidence could only be admitted into evidence under and in accordance with s 90A. Even though s 90C provided for the primacy of ss 90A and 90B over any other law relating to admission and proof of evidence, other provisions of the Act providing for admissibility of documents were not necessarily inconsistent with s 90A (see para 35(c)–(d)).

(4) The plaintiff's obligations under the original agreement were fully performed once he had procured the clients for the defendant. Therefore, his share of profits were payable even though they might have accrued after he had commenced employment with the defendant. There was no conflict between the plaintiff's obligations under the original agreement and his duties as the defendant's employee, in particular the duty of fidelity and exclusivity placed on employees. Accordingly, the parties could not have intended for the original agreement to have terminated as a result of the plaintiff's employment with the defendant (see paras 46–50).

**[Bahasa Malaysia summary**

Defendan merekrut, mengambil pekerja dan menguruskan pekerja-pekerja asing. Ia menggaji plaintif untuk memperoleh kontrak daripada syarikat yang menghendaki pekerja asing. Sebagai balasan, plaintif dibayar peratusan keuntungan yang didapati selagi pelanggan diperkenalkan oleh plaintif kekal pelanggan defendan. Plaintif kemudian telah menjadi pekerja defendan dan semasa pekerjaannya mendapati bahawa defendan tidak membayarnya beberapa keuntungan yang perlu dibayar kepadanya di bawah urusan mereka sebelumnya ('perjanjian asal'). Plaintif telah memfailkan guaman ini menuntut RM1,027,302 berkenaan perniagaan yang diperolehnya untuk defendan daripada Texas Instruments Malaysia Bhd ('Texas Instruments'), RM186,462 berkenaan perniagaan yang diperolehnya daripada STATS ChipPAC Malaysia Sdn Bhd ('STATS ChipPAC') dan RM304,435 berkenaan Advanced Micro Devices Export Sdn Bhd ('AMD'). Semasa perbicaraan, plaintif memohon untuk mengemukakan keterangan perjanjian bekalan pekerja asing antara defendan dan tiga syarikat yang dipersoalkan, dokumen menunjukkan bilangan pekerja yang dibekal oleh defendan, invois-invois yang dikeluarkan oleh defendan dan dokumen menunjukkan kos dan perbelanjaan defendan yang ditanggung untuk membekal pekerja-pekerja itu kepada syarikat-syarikat tersebut. Beberapa dokumen yang digunakan adalah dikeluarkan oleh komputer dan isu yang timbul sama ada mereka boleh diterima kerana tiada perakuan di bawah s 90A(2) Akta Keterangan 1950 ('Akta tersebut') telah ditenderkan semasa perbicaraan, mahupun terdapat testimoni dipanggil untuk membuktikan bahawa dokumen-dokumen yang dipersoalkan telah dikeluarkan sepanjang penggunaan biasa komputer-komputer yang mengeluarkan dokumen-dokumen tersebut.

**Diputuskan,** membenarkan hanya tuntutan berkenaan AMD dan memerintahkan defendan membayar plaintif RM151,418.80 dengan faedah pada 5% setahun dari 1 Januari 2009 hingga tarikh penghakiman dan selepas itu faedah pasca penghakiman sehingga tarikh penyelesaian penuh:

(1) Plaintif hanya boleh membuktikan dokumen-dokumen yang berkenaan keuntungan yang dibuat berkaitan dengan bekalan pekerja-pekerja asing kepada AMD tetapi bukan berkaitan Texas Instruments atau STATS ChipPAC. Oleh kerana dia telah membuktikan tuntutannya sebanyak RM304,435 berkenaan AMD tetapi telah mengakui menerima RM153,016.20 daripada defendan, penghakiman diberikan untuk baki tersebut (lihat perenggan 8, 15–16 & 40).

(2) Berdasarkan autoriti keputusan Mahkamah Rayuan dalam kes *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317 dan keputusan Mahkamah Persekutuan dalam *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617, dokumen-dokumen yang dikeluarkan daripada komputer yang dipohon untuk digunakan oleh plaintif boleh diterima

walaupun keperluan s 90A Akta Keterangan tidak dipatuhi, dengan syarat pembuat dokumen tersebut dipanggil atau dengan syarat dokumen tersebut boleh diterima di bawah mana-mana pengecualian tetap kepada rukun dengar cakap. Dalam kes ini, fakta yang menjadi isu adalah sama ada defendan telah menerima daripada AMD jumlah yang dinyatakan dalam invois-invois mereka. Ia tidak dipertikaikan bahawa defendan-defendan atau ejen-ejennya mengeluarkan invois-invois tersebut. Oleh itu, invois-invois tersebut membentuk penerimaan di bawah s 17(1) Akta tersebut bahawa defendan telah menginvoiskan AMD jumlah yang dinyatakan dalam invois-invois tersebut. Di bawah s 21 Akta tersebut, suatu penerimaan adalah relevan dan boleh dibuktikan terhadap pembuatnya (lihat perenggan 19, 36 & 39(c)).

(3) Seksyen 90C Akta tersebut tidak boleh dibaca untuk bermaksud keterangan yang dikeluarkan oleh komputer hanya boleh diterima sebagai keterangan di bawah dan menurut s 90A. Walaupun s 90C memperuntukkan untuk keutamaan ss 90A dan 90B mengatasi mana-mana undang-undang lain berkaitan penerimaan dan bukti keterangan, peruntukan lain Akta tersebut yang memperuntukkan untuk kebolehterimaan dokumen-dokumen tidak semestinya tidak konsisten dengan s 90A (lihat perenggan 35(c)–(d)).

(4) Obligasi plaintif di bawah perjanjian asal telah dilaksanakan sepenuhnya setelah dia memperoleh pelanggan untuk defendan. Oleh itu, bahagian keuntungannya boleh dibayar meskipun mereka mungkin telah terakru selepas dia mula bekerja dengan defendan. Tiada konflik antara obligasi plaintif di bawah perjanjian asal dan kewajipannya sebagai pekerja defendan, khususnya kewajipan tentang kesetiaan dan sifat eksklusif yang diletakkan ke atas pekerja-pekerja. Sewajarnya, pihak-pihak tidak mungkin telah berniat agar perjanjian asal itu ditamatkan akibat daripada pekerjaan plaintif dengan defendan (lihat perenggan 46–50).]

**Notes**

For cases on admissibility, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 1456–1482.

**Cases referred to**

*Ahmad Najib bin Aris v PP* [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (folld)
*Azilah bin Hadri & Anor v PP and another appeal* [2013] 5 MLJ 309; [2013] 7 CLJ 577, CA (refd)
*Gnanasegaran a/l Pararajasingam v PP* [1997] 3 MLJ 1; [1997] 4 CLJ 6, CA (refd)
*Hanafi bin Mat Hassan v PP* [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)
*James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796, HL (refd)

*KTL Sdn Bhd & Anor v Leong Oow Lai* [2014] MLJU 1405; [2014] 1 LNS 427, HC (refd)
*Mohd Khayry bin Ismail v PP* [2014] 4 MLJ 317; [2014] 1 LNS 412, CA (folld)
*PP v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (folld)
*PP v Lim Kang Wee* [2014] 1 LNS 1757, HC (refd)
*Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor* [2010] 4 MLJ 157; [2010] 8 CLJ 49, CA (refd)

**Legislation referred to**

Evidence Act 1950 ss 17(1), 21, 64, 65, 65(1), (1)(c), 90A, 90A(1), (2), (4), (6), 90B, 90C, 103
Rules of Court 2012 O 34 r 2(2)

*Abdul Halim Bahari (Mohd Fasha Musthafa with him) (Azra & Assoc) for the plaintiff.*
*T Gunaseelan (Gunaseelan & Assoc) for the defendant.*

**Azizul Azmi JC:**

INTRODUCTION

**[1]** The plaintiff, who was once an employee of the defendant company, sued the latter for money that he alleged were due to him arising under an agreement that pre-dated the plaintiff's employment with the defendant. After trial, I allowed the plaintiff's claim in part, against which decision the defendant has now appealed.

**[2]** The crux of this case turns on the admissibility of computer-generated evidence and the seminal decision of the Court of Appeal in *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317; [2014] 1 LNS 412.

BACKGROUND AND MATERIAL FACTS

**[3]** The background facts in so far as they were material to the determination of this case were as follows.

**[4]** The plaintiff was a human resource consultant who provided consulting services in connection with the recruitment of foreign workers. The defendant was a company that was authorised by Kementerian Hal Ehwal Dalam Negeri to recruit, manage and employ foreign workers. They entered into an agreement on 25 October 2005 ('the original agreement') pursuant to the terms of which the plaintiff was to procure and secure contracts from clients for the recruitment, supply and management of foreign workers.

**[5]** The original agreement was curiously silent as to the nature of the relationship between the parties. I am of the view that, based on its true construction, the agreement operated to govern the terms of an unincorporated joint venture between the parties. This finding does not materially affect the issues in dispute, but assists in the understanding of the background facts.

**[6]** Under the terms of this agreement, the plaintiff was to have been paid 30% of the profits of the 'business', which was defined in recital D of the agreement as 'the business of recruiting and managing foreign workers for business undertakings'. The manner in which the profits were to be calculated was provided for in cl 2.1 of the original agreement, which prescribed the usual manner in which profits are determined: revenue less costs.

**[7]** Two supplemental agreements were entered into between the parties on 7 December 2005. Although the defendant initially disputed the authenticity of these supplemental agreements and had pleaded that it had no knowledge of them, the fact of their existence was conceded in the course of trial. Under the terms of these supplemental agreements, the plaintiff was granted exclusivity to procure business from thirteen companies that were specifically identified, which included Advanced Micro Devices Export Sdn Bhd ('AMD'), Texas Instruments Malaysia Sdn Bhd ('Texas Instruments') and STATS ChipPAC Malaysia Sdn Bhd ('STATS ChipPAC'). This exclusivity operated for a period of three months. The supplemental agreements also provided that if the plaintiff was successful in procuring business from the specified companies, the defendant would pay to the plaintiff, in accordance with cl 2 of the original agreement, 30% of the profits 'for as long as the client company is a client of (the defendant)'.

**[8]** The plaintiff claimed to have successfully procured contracts for AMD, Texas Instruments and STATS ChipPAC within the exclusivity period, and the plaintiff acknowledged that the defendant had paid him the sum of RM153,016.20.

**[9]** On 23 July 2007, the defendant made an offer of employment to the plaintiff, for the plaintiff to be the chief operating officer of the 'JR Group of Companies based in JR Joint Resources Holdings Sdn Bhd', which meant that although the plaintiff was to be employed by the defendant, the scope of his responsibilities extended to all the companies within the group. The plaintiff commenced employment on 1 September 2007. In July 2008, the plaintiff was employed as the chief operating officer of another company within the group.

**[10]** In the course of his employment, the plaintiff discovered information that he believed indicated that the defendant had not paid his share of the profits under the original agreement. Specifically, the plaintiff claimed that he should have been entitled to:

(a) the amount of RM1,027,302 in respect of Texas Instruments;

(b) the amount of RM186,462 in respect of STATS ChipPAC; and

(c) the amount of RM304,435 in respect of AMD.

**[11]** In supporting his claim, the plaintiff sought to adduce evidence that could be classified into the following broad categories:

(a) the foreign worker supply agreements entered into between the defendant and each of Texas Instruments, STATS ChipPac and AMD ('the clients');

(b) the information relating to the headcount of foreign workers supplied to the clients;

(c) invoices issued by the defendant to the clients; and

(d) internal documents of the defendant purportedly showing the costs and expenses incurred by the defendant in the supply of foreign workers to the clients.

**[12]** Logic dictates that, in order to establish the share of the profits that were due to him, the plaintiff will have had to establish:

(a) the amount of *revenue* that the defendant had obtained from each of the clients. This can be ascertained by proving the relevant foreign worker supply agreements and EITHER the headcount of workers supplied to the client OR the invoices issued; and

(b) the *costs* incurred by the defendant in supplying the foreign workers to each of the clients. This can be determined by proving the internal costing documents.

**[13]** Some of the documents that were required to have been proven were computer-generated documents.

ISSUES

**[14]** The issues that were to be determined by the court were as follows:

(a) whether the appointment of the plaintiff as the chief operating officer of the defendant had the effect of terminating the original agreement; and

(b) whether there were any amounts outstanding from the defendant to the

plaintiff under the original agreement, and in this connection, whether:

(i) the computer-generated documents sought to be adduced by the plaintiff were admissible; and

(ii) whether the internal costing documents took into account all the actual costs that had been incurred by the defendant in supplying the foreign workers to the clients.

SUMMARY OF FINDINGS AND DECISION

**[15]** This court found that:

(a) the original agreement was not terminated by virtue of the appointment of the plaintiff as chief operating officer of the defendant. As a consequence, the profit share payments under the original agreement were payable even though they may have accrued after the plaintiff had commenced employment with the defendant. None of the obligations of the plaintiff under the original agreement remained executory at the time he had commenced employment with the defendant. Therefore there was no conflict between his obligations under the original agreement and his duty of fidelity and exclusivity to the defendant as an employee of the defendant;

(b) the plaintiff was only able to prove the documents relating to the profits obtained in connection with the supply of foreign workers to AMD, but not in respect of Texas Instruments or STATS ChipPAC; and

(c) the defendant bore the evidential burden of proving that the internal costing documents did not take into account all the actual costs incurred. On the facts, the defendant failed to discharge this burden.

**[16]** The court consequently ordered:

(a) the defendant to pay the plaintiff the sum of RM151,418.80 (being the amount claimed in respect of AMD, less the sum that the plaintiff acknowledged as having received);

(b) the defendant to pay the plaintiff interest on the amount referred to in sub-para (a) at a rate of 5%pa from 1 January 2009 (being the day after the period for which the outstanding profits had been claimed) until the date of judgment;

(c) the defendant to pay the plaintiff post-judgment interest on the sums referred to in sub-paras (a) and (b) at the prescribed rate from the date of judgment until full settlement; and

(d) costs of RM15,000 against the defendant, which took into account the fact that the plaintiff sought to tender documents in a manner that made

it necessary for me to adjourn the trial in order to afford the counsel for the defendant adequate time to examine their contents.

**[17]** The grounds upon which this decision are based are explained in the following paragraphs.

ADMISSIBILITY OF COMPUTER-GENERATED EVIDENCE

**[18]** As mentioned at para 13 above, the plaintiff sought to adduce computer-generated documents to prove the amount of profits that he alleged were due to him under the original agreement, read together with the supplemental agreements. However, no certificate under s 90A(2) of the Evidence Act 1950 was produced at trial. Nor was any testimony called to establish that the documents in question had been produced in the course of the ordinary use of the computers that had generated the documents. The question therefore was whether the plaintiff was precluded from relying on the computer-generated documents on the basis that these documents were inadmissible for non-compliance with the requirements of the Evidence Act 1950.

**[19]** In the following paragraphs, I examine the scope of s 90A–90C of the Evidence Act 1950, and conclude that, based on the authority of the Court of Appeal decision in *Mohd Khayry bin Ismail v Public Prosecutor* and the Federal Court decision in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, computer-generated documents may be admissible even where the requirements of s 90A have not been complied with, provided that the makers of the documents are called or provided such documents are admissible under any accepted common law or other statutory exception to the rule against documentary hearsay.

**[20]** Section 90A–90C of the Evidence Act 1950 provide for the rules governing the admissibility of computer-generated evidence. Enacted in 1993, these provisions provide for an important exception to the rule against documentary hearsay.

**[21]** Section 90A(1) of the Evidence Act 1950 provides for the admissibility of documents produced by a computer in the course its ordinary use. Such documents need not be tendered through their maker in order to be admissible.

**[22]** If a certificate pursuant to s 90A(2) is tendered in court, then the document will have been proven as having been produced by a computer in the course of its ordinary use. However, such certificate is not mandatory, as oral evidence could be called to establish that the document in question has been produced in the course of the ordinary use of the computer: see *Gnanasegaran*

*a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6. In addition, where a s 90A(2) certificate is tendered, it will be presumed that the computer in question was in good working order and was operating properly in all respects at the time the document was produced.

**[23]** Where oral evidence is adduced to establish the fact that a document had been produced by a computer in the course of its ordinary use, the matters presumed under s 90A(4) must be proved by oral evidence: see the decision of the Court of Appeal in *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269. In other words, the witness in question must testify that the computer used to produce the document was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

**[24]** The Court of Appeal in *Azilah bin Hadri & Anor v Public Prosecutor and another appeal* [2013] 5 MLJ 309; [2013] 7 CLJ 577 held that the person providing the oral testimony on the operability of the computer must be the person responsible for the management and operations of the computer that had been used to produce the document, and that it would not be sufficient for the witness to simply state that the computer belonged to him or her (at p 599 (CLJ)).

**[25]** The decision of the Court of Appeal on the admissibility of the computer generated document (which in this case was a location mapping report prepared from cellular data by an employee in the investigation division of Celcom, a mobile telephone service provider) was reversed on appeal. The Federal Court held in *Public Prosecutor v Azilah bin Hadri & Anor* :

> In this case, the call logs were produced by computers in the course of their ordinary use by the very makers, namely PW61, PW62 and PW63 hence dispensing with the requirements of tendering to the court signed certificates that they were responsible for the management of the operation of the computers, or for the conduct of the activities for which those computers were used for. The need to adduce the certificates as required by s 90A(2) of the Evidence Act 1950 had thus become redundant.

**[26]** It would appear that the Federal Court was of the view that the witnesses who had testified in court were the makers of the location mapping reports, and hence s 90A of the Evidence Act 1950 did not apply. The Federal Court did not directly address the question of law whether it was still necessary for the person testifying orally on the operability of the computer to be the person responsible for the management and operation of the computer.

**[27]** In *Hanafi Mat Hassan v Public Prosecutor* , Augustine Paul JCA considered the effect of s 90A(6) of the Evidence Act 1950 and in so doing had

stated:

> So s 90A(6) must have some other purpose to serve. Its true scope and meaning will become clear if it is read in the light of s 90C. It provides that the provisions of ss 90A and 90B shall prevail over any other provision of the Evidence Act 1950 *thereby making s 90A the only law under which all documents produced by a computer are to be admitted in evidence.* There may be instances when a document which is sought to be admitted in evidence may not have been produced by a computer in the course of its ordinary use even though it is one that is contemplated by s 90A(1). The document, even though produced by the computer, may not have anything to do with the ordinary use of the computer. It may, for example, be a letter produced by the computer which has no bearing on the ordinary use of the computer. Yet it is still a document produced by a computer. How is this document to be admitted in evidence bearing in mind *the prevailing effect of s 90C in making all documents produced by a computer admissible only under s 90A* if the condition precedent to its admissibility under s 90A(1) cannot be fulfilled by virtue of it not having been produced by the computer in the course of its ordinary use? (Emphasis added.)

**[28]** The effect of the somewhat unhappily worded s 90A(6) need not detain us for the purposes of the present case, save that I would point out that a clue as to the intent of the draftsperson can be seen in the judgment of Mahadev Shankar JCA in *Gnanasegaran a/l Pararajasingam v Public Prosecutor* where he had stated:

> Zainal gave evidence that the office copies of the monthly statements and the various other documents tendered by him had been handed to the police when the investigations were under way. Ordinarily, a document would only be admissible as evidence of the facts it contains if the record and the event recorded are contemporaneous. Section 90A(6) relaxes this requirement also. The contemporaneous document here is the data keyed in at the time of the transaction. The printout is only a process of retrieval. By s 90A(6) this retrieval can come after investigation or even after the trial has begun.

**[29]** The key point to be appreciated from the dicta of Augustine Paul JCA was that he had held that computer generated evidence was not admissible otherwise than in accordance with the provisions of s 90A (whether by the production of a s 90A(2) certificate, or by oral testimony affirming as to the operability of the computer).

**[30]** This narrow view of the admissibility of computer evidence was not followed by a more recent Court of Appeal decision in *Mohd Khayry Ismail v Public Prosecutor* where it held that s 90A does not displace the common law rules of admissibility of evidence. If the computer-generated evidence would be admissible under any provision of law creating for an exception to the rule against hearsay or if the document would have otherwise been admissible at common law, then a court may receive the document into evidence, notwithstanding the fact that the provisions of s 90A had not been complied

with. The relevant passage from the judgment of Hamid Sultan JCA bears setting out in full:

> [T]he amendments in relation to documents to EA 1950 do not in any way affect the common law position as set out in *R v Maqsud Ali* . The amendments allow further hearsay documents which may be difficult to be made admissible under the common law because of the hearsay rule and its prejudicial effect, to be made admissible provided the criteria set out in the amendments are complied with. The new amendments such as s 90A do not displace common law rules as to admissibility. That is to say if the party cannot admit a document in consequence of the common law restriction then he may get the document admitted under any of the new provisions such as s 90A, etc

**[31]** In this case, which involved the murder of two persons by a bomb concealed in two pomelos, the Court of Appeal held that CCTV evidence (showing the accused buying pomelos) was admissible on the basis of *res gestae*, notwithstanding fact that no certificate under s 90A(2) had been tendered into court.

**[32]** The point came to be considered by the High Court in *Public Prosecutor v Lim Kang Wee* [2014] 1 LNS 1757, where the prosecution sought to argue that a CCTV recording ought to be admissible under common law principles of evidence even though the requirements of s 90A had not been complied with. In rejecting this argument, Kamardin J stated:

> Dengan hormatnya, mahkamah ini berpandangan bahawa oleh kerana seksyen 90A telah memperuntukkan cara bagaimana keterangan komputer boleh diterima masuk oleh Mahkamah, maka peruntukan tersebut yang telah diperuntukkan di bawah statut hendaklah dipatuhi dan diikuti. Untuk itu Mahkamah ini masih terikat dengan keputusan oleh Mahkamah Persekutuan dalam kes *Ahmad Najib Aris*.

**[33]** Here, Kamardin J considered that the Federal Court decision in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 was binding authority for the proposition that computer-generated evidence may only be admitted in compliance with the provisions of s 90A of the Evidence Act 1950.

**[34]** Zulkefli Makinudin FCJ, in delivering the judgment of the Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* , reproduced *in extenso* the passages of the judgment of Augustine Paul JCA in *Hanafi bin Mat Hassan v Public Prosecutor* discussing the legal effect of s 90A(6), including the passage quoted at para 27 *ante*, and stated:

> I agree with the views expressed in the above passages from *Hanafi Mat Hassan v Public Prosecutor* in the analysis of s 90A. In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be

proved by the tendering in evidence of a certificate under s 90A(2) or by way of oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but also the matters presumed under s 90A(4). On the other hand the presumption contained in s 90A(6) can be resorted to only when the document was not produced by a computer in the course of its ordinary use.

**[35]** I respectfully depart from the views expressed by Augustine Paul JCA (as his lordship then was when delivering the judgment in *Hanafi bin Mat Hassan v Public Prosecutor* ) and elect to follow the decision of Hamid Sultan JCA in *Mohd Khayry bin Ismail v Public Prosecutor* . This is not a decision made lightly, given the stature of the learned judges to whom I have heretofore referred, not least Dato' Seri S Augustine Paul, who was one of our foremost scholar and jurist on the subject of evidence. I consider myself justified in departing from the dicta in *Hanafi bin Mat Hassan v Public Prosecutor* for the following reasons:

(a) even though the Federal Court in *Ahmad Najib bin Aris v PP* approved of the passage in *Hanafi Mat Hassan v Public Prosecutor* where Augustine Paul JCA expressed the view that computer evidence may only be admitted through s 90A, I am of the view that this proposition of law did not form the ratio decidendi of the Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* . The issue under consideration in that case was the application of s 90A(6) to render admissible a chemist report for which no s 90A(2) certificate had been tendered and in respect of which no oral evidence was adduced to show that the report was produced by a computer in the course of its ordinary use.

The issue of the scope of s 90C and whether it precluded the admission of computer-generated evidence pursuant to the operation of other provisions of the Evidence Act 1950 or under common law were not under consideration. As such, the Federal Court's endorsement of the of the dicta in *Hanafi bin Mat Hassan v Public Prosecutor* would, in my respectful opinion, be limited to the interpretation of the effect of s 90A(6);

(b) the more recent decision of the Federal Court in *Public Prosecutor v Azilah bin Hadri & Anor* had allowed the location mapping reports to be introduced into evidence on the basis that the witnesses in question were the makers of the reports. It stands to reason that where the maker of a document appears in court, that document ought to be admissible as there is no issue of hearsay arising;

(c) conceptually, s 90A is a permissive provision, and operates as an exception to the exclusionary rule of hearsay. In my judgment, it is not intended to expand the exclusionary rule, and therefore s 90C should not

be read to mean that computer-generated evidence may only be admitted into evidence under and in accordance with s 90A of the Evidence Act 1950. It follows that because s 90A is merely an exception to the exclusionary rule, where the exclusionary rule does not apply-for example, where the maker of a statement is called to testify as was the case in *Public Prosecutor v Azilah bin Hadri & Anor* – the exception will be similarly inapplicable; and

(d) even though s 90C of the Evidence Act 1950 provides for the primacy of ss 90A and 90B over any other law relating to admission and proof of evidence, the other provisions of the Evidence Act 1950 providing for admissibly of documents are not necessarily inconsistent with s 90A. For example, a computer-generated document that is sought to be proven against its maker ought to be admissible at common law and as an admission of a fact in issue pursuant to s 21 of the Evidence Act 1950 (at least as far as civil proceedings are concerned), as it would stand to reason that the maker of a computer-generated document against whom the document is sought to be proven-if he is also the owner of the computer that generated the document-would not testify that the computer was in good working order and operating properly. Nor would he issue a s 90A(2) certificate in such circumstances. This analysis is supported by a construction of s 90A(1) itself, which provides:

> In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

These words, in my view, do not preclude the application of other rules of evidence; had it been the intention of parliament to so preclude, then the draftsperson would have provided that such document 'shall only be admissible ... ' or 'shall not be admissible ... unless ... '

**[36]** Accordingly, the computer-generated documents that had been sought to be relied upon by the plaintiff could be admissible even in circumstances where the requirements of s 90A of the Evidence Act 1950 had not been complied with, provided either that the makers of the document were called or that the documents were admissible under any other established exception to the rule against hearsay.

**[37]** In the following paragraphs, I consider the admissibility of the various items of evidence sought to be adduced by the plaintiff.

ANALYSIS OF DOCUMENTS ADDUCED BY THE PLAINTIFF

**[38]** The documents relating to each client are considered in turn.

*AMD*

**[39]** The documents sought to be adduced by the plaintiff relating to AMD were: (a) the emails and Microsoft Excel spreadsheets reproduced at B/73–76 of the trial bundle, which provided information on the headcount of foreign workers supplied to AMD; (b) the costing spreadsheet for AMD, reproduced at C/1 in the trial bundle; and (c) the foreign worker supply agreement entered into between the defendant and AMD, the related correspondence as well as all the invoices sent by the defendant to AMD. The admissibility of each of these are discussed in the following paragraphs:

(a) the emails and spreadsheets at B/73–76 (showing the number of employees supplied to AMD for the relevant period) were categorised by counsel as Part B, for the purposes of O 34 r 2(2) of the Rules of Court 2012. They are accordingly deemed to have been agreed as to existence and authenticity with the remaining issues being the meaning of the statements contained in such document and the probative value to be attached to the documents.

Counsel for the defendant sought to argue that, notwithstanding the fact that the documents have been categorised as Part B documents, it was still necessary for the plaintiff to have called the maker of these documents, failing which the documents were not admissible in evidence.

In my judgment, the advent of the Rules of Court 2012 changes quite significantly the legal position on the admissibility of documents in civil trials, which has been explained with characteristic pithiness by Wong Kian Kheong JC in *KTL Sdn Bhd & Anor v Leong Oow Lai* [2014] MLJU 1405; [2014] 1 LNS 427. I can do no better than to reproduce the relevant passages here:

> 32. Order 34 rr 2(2)(d), (e)(i) and (ii) of the Rules of Court 2012 (RC) provide that during pre-trial case management, parties may:
>
> (a) agree to both the authenticity and contents of documents to be adduced and used at trial (Part A Documents);
>
> (b) agree only to the authenticity but dispute the contents of documents to be adduced and used at trial (Part B Documents). Part B Documents are documents where parties agree to their authenticity but dispute the weight to be attached to these documents; and
>
> (c) dispute both the authenticity and contents of documents to be adduced and used at trial (Part C Documents).

33. It is to be noted that s 58(1) and (2) of the Evidence Act 1950 (EA) allow parties in a civil suit to agree to admit any 'fact' (defined widely in s 3(a) of the EA to include documents).

34. If a document is classified as a Part C Document, the party adducing that document bears the evidential burden to satisfy the court on a balance of probabilities the following 2 conditions of admissibility of that document (2 Conditions of Admissibility) :

(a) in accordance with the rule against documentary hear say, the maker of the Part C Document has to be called as a witness – the Federal Court's judgment in *Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 4 CLJ 1, at p 20, 21–25 and 28. If the maker of a Part C Document cannot be called as a witness, the party adducing that document has to satisfy the court regarding the application of any one of the exceptions to the hearsay rule such as ss 32(1)(a)–(h) [s 32(i) and (j) EA only apply to criminal proceedings according to ss 32(2)(a) EA], 33–37, 73A(1), (2) and/or 90A(1) EA [s 90C EA provides that s 90A EA shall prevail over, among others, any other provision of EA relating to the proof of evidence]; AND

(b) 'primary evidence' of the Part C Document as understood in s 62 EA must be adduced in court as required by s 64 EA – the Supreme Court's decision in *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627, at p 631. It is to be noted that Explanation 3 of s 62 EA provides that a document produced by a computer (in compliance with s 90A EA) is primary evidence. If 'primary evidence' of a Part C Document is not available, s 64 EA provides that 'secondary evidence' [within the meaning of s 63(a)–(e) EA] of the Part C Document can only be admitted as evidence if there is proof of the application of any one of the paragraphs in s 65(a)–(g) EA.

35. The 2 Conditions of Admissibility need not be fulfilled in respect of Part A Documents and Part B Documents.

36. As the 2 Conditions of Admissibility apply to a Part C Document, O 34 r 2(2)(i) RC allows any party to apply to court for directions during pre-trial case management to 'ascertain' whether the opposing party still insists on the classification of that document as a Part C Document. Order 34 r 2(2)(i) RC empowers the court to 'make such order or give such direction as is necessary to achieve the just, expeditious and economical conduct of the trial'. I am of the considered view that if a party still insists on categorising a document as a Part C Document, namely to put the opposing party to fulfil the 2 Conditions of Admissibility, that party is entitled to do so but the court may make a note of such a conduct by that party. Such a conduct may be subsequently taken into account by the court in deciding whether to award costs after trial and if so, how much – O 59 r 8(b) RC (conduct of all parties, including conduct before and during proceedings).

37. In view of O 34 rr 2(2)(d), (e) and (i) RC, cases decided on agreed bundle of documents before the advent of RC such as the Supreme Court case of

*Jaafar Shaari & Anor v Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 4 AMR 3744 and the High Court's judgment in *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1999] 1 CLJ 601; [1998] 4 AMR 3936, in my respectful opinion, should be read with caution.

The observation may be made that the mechanism for the categorisation of documents contained in O 34 r 2(2) forms an important exception to the general rule that the admissibility of documents is a matter of law, and not subject to the agreement of parties. It follows as a necessary corollary of the analysis by Wong Kian Kheong JC that any document that have been categorised in Part B would be admissible, and that there would be no further requirement to call its maker.

I accordingly ruled that the emails and spreadsheets providing information on the headcount of foreign workers supplied to AMD at B/73–76 were admissible;

(b) the next document was the costing spreadsheet for AMD, reproduced at C/1 in the trial bundle. This was a Part C document. This document had been initialled by Ms Shareena Martin ('PW2'), who was the financial controller for the defendant at the material time. I ruled that the document was admissible, on account that PW2 as the maker of the document was present to testify. Although the spreadsheet originated as a computer-generated document, what was sought to be introduced into evidence was the print-out of the spreadsheet that had been initialled by PW2. The situation was the same as any correspondence that had been produced by a computer using a word processing application. The print-out that had been signed would be primary evidence and admissible, provided that the signatory – as the maker of the document-was called to testify.

The defendant disputed the costing calculations adduced by the plaintiff and asserted that these costings:

(i) did not take into consideration certain other costs; and

(ii) were subject to the final say of the managing director of the defendant and hence were not the final costings applicable in respect of each contract.

The defendant, through its chief financial officer ('DW2'), sought to introduce documents showing that, had these other items of costs been taken into account, the defendant would have incurred losses on all the contracts.

The difficulty with the testimony of DW2 was that he had no personal knowledge of the actual costs incurred in providing the foreign workers to the clients. The calculations that he had produced were, at best, merely illustrative and did not prove the defendant's assertion. The defendant

was not able to adduce contemporaneous documentary evidence that supported its assertion that there were other costs that had not been reflected in the costing document adduced by the plaintiff.

It has to be borne in mind that the defendant bore the evidential burden of proving that there were other items of costs that had been incurred but not taken into account in the AMD costing document. Under s 103 of the Evidence Act 1950, the evidential burden of a fact in issue lies with the party seeking to convince the court of the existence of that fact. In my judgment, the defendant has not discharged this evidential burden.

I was satisfied that, based on a balance of probabilities, the AMD costing document correctly reflected the actual costs incurred by the defendant in providing foreign workers to AMD;

(c) Mr Teoh Chin Hoo ('PW4'), the financial controller for AMD, testified that the foreign worker supply agreements entered into between the defendant and AMD (at C/6–35), the quotation from the defendant and related correspondence (at C/36–37), as well as all the invoices sent by the defendant to AMD (at C/62–219 and C1/220–511) were scanned and kept only as electronic copies in its enterprise management system (see notes of evidence for 29 September 2015, at p 10). Accordingly, the secondary evidence of the agreement and invoices would be acceptable, on the basis that the document no longer exists in physical form, and therefore s 65(1)(c) of the Evidence Act 1950 applied to allow reception of the copies.

Even though the documents had originated in printed form, they had been scanned and stored in AMD's computer system. Therefore the print-outs tendered at trial constituted documents produced by a computer for the purposes of the Evidence Act 1950.

No evidence was tendered whether the computer in which the electronic copies were stored had been in good working order and was operating properly. Nor was a s 90A certificate issued and tendered into court. This was nonetheless not fatal to the plaintiff's case, because applying the principle in *Mohd Khayry bin Ismail v Public Prosecutor* , a computer generated document may still be admissible in the absence of fulfilment of the requirements of s 90A of the Evidence Act 1950, if it is admissible under another exception to the rule against hearsay. In this case, the fact in issue was whether the defendant had received from AMD the amount stated in the invoices. It was not disputed that the defendants or its agents were the author of the invoices, and as such, the invoices amounted to an admission within the meaning of s 17(1) of the Evidence Act 1950 that the defendant had invoiced AMD the sums stated in the invoices. Under s 21, an admission is relevant and may be proved against its maker.

A similar analysis may be applied in connection with proof of the foreign worker supply agreement that AMD had entered into with the defendant.

In assessing the weight to be attached to the documentary evidence, guidance may be obtained from s 90B of the Evidence Act 1950, which permits the court to draw any reasonable inference from the relevant circumstances and to have regard to whether the supplier of a document has any incentive to conceal or misrepresent any fact or statement contained in the document. In the present case, the party testifying was a subpoena witness from a client of the defendant, who in my judgment has no particular interest in the outcome of the suit. I found this a relevant consideration, and was satisfied that the evidence contained in the invoices was reliable.

In cross-examination of PW4, the counsel for the defendant sought to bring the court's attention to certain documents which indicated that the automated attendance recording system had not captured the attendance of certain workers. I was nonetheless satisfied with the reply given by PW4, and was of the view that the documentary records correctly reflected the man-hours incurred by AMD.

**[40]** Having considered the evidence as whole, I was of the view that the documents introduced through PW4 were sufficient to establish that the defendant had been paid the amounts stated in the invoices to AMD. The evidence of the invoices was corroborated by the headcount spreadsheet, which read together with the terms of the foreign worker supply agreements and related correspondence, established the amount of revenue received by the defendant from AMD. The costs of supply of the foreign workers were established through the costing spreadsheet, which I found to be admissible and capable of proving the costs that had been incurred by the defendant in connection with the supply of the foreign workers to AMD. I accordingly allowed the plaintiff's claim for the amount of RM304,435 for his share of the profits attributable to AMD, but subject to a deduction for the amounts that the plaintiff had received from the defendant.

*Texas Instruments*

**[41]** In relation to the plaintiff's claim in connection with the foreign workers supplied to Texas Instruments, I found that the headcount spreadsheet (B/86–89) as well as the invoices reproduced in C/2–5 of the trial bundle were inadmissible. The plaintiff's failure to prove these documents meant that he could not establish the total revenue that had been obtained in respect of the supply of foreign workers to Texas Instruments, which in turn meant that his share of the profits relating to Texas Instruments under the original agreement

could not be proven. The admissibility of the headcount spreadsheet and the invoices are analysed in the following paragraphs: A

(a) the Texas Instrument headcount spreadsheet at B/86–89 was categorised as a Part C document, and therefore has not been admitted as to its contents or authenticity. This document appeared to have been delivered by e-mail to the plaintiff by a certain Mariani Omar, who was not called to give evidence at trial. Although the plaintiff had printed the document using his computer, the plaintiff was not the maker of the document. I ruled that this document was inadmissible due to the rule against documentary hearsay because: B C

(i) no evidence was led in the witness statement of the plaintiff to show that Mariani Omar had given the document to the plaintiff or that she was an employee of the defendant at the material time. This was significant because if it had been shown that Mariani was an employee of the defendant, the document may have been admissible on the basis that it was an admission of a fact in issue; and D

(ii) it was clear that the spreadsheet was a computer generated document and could have been received in evidence even in the absence of the maker if the requirements of s 90A of the Evidence Act 1950 had been fulfilled. However: E

(1) no s 90A(2) certificate was produced;

(2) the plaintiff did not testify that the computer he used was working properly and in good working order; F

(3) in any event, the person who was responsible for the management of the operation of the computer used by Mariani (the sender of the e-mail) was not called to testify whether her computer was working properly and in good working order.

G

If Mariani had been called, and it was established that she was an employee of the defendant and that the Texas Instrument headcount spreadsheet had been prepared by the defendant, then I am of the view that the spreadsheet could have been received in evidence on the basis that it would have been an admission of a fact in issue (within the meaning of s 17(1) and pursuant to s 21 of the Evidence Act 1950), on the authority of the decision of the Court of Appeal in *Mohd Khayry bin Ismail v Public Prosecutor* . This would have been so even in the absence of a s 90A(2) certificate or oral testimony showing that the requirements in s 90A(4) of the Evidence Act 1950 had been fulfilled. I note for completeness that the headcount spreadsheet at B/88 (categorised as Part C) had also been mistakenly reproduced at B/80 in the trial bundle, which was categorised as a Part B document. In analysing the admissibility of this document, I regarded it as having been categorised as a Part C document; H I

(b) Zuraidah Ghazali ('PW3'), the finance director of Texas Instruments, gave testimony at trial regarding information extracted from Texas

Instruments' enterprise management system. This extract indicated that there were four invoices of the defendant that were paid by Texas Instruments in 2008. This extract was produced by a computer, in respect of which no s 90A(2) certificate was tendered. Nor was the person who was responsible for the management of the enterprise management system of Texas Instruments called to give testimony on whether the computer system was in good working order or was operating properly at the time the document was produced. I therefore ruled the extract inadmissible to show that the payments had been made, as the requirements of s 90A of the Evidence Act 1950 had not been complied with.

The counsel for the plaintiff sought to argue that the extract corresponded to the four invoices reproduced in C/2–5 of the bundles, which were categorised as Part C documents. The originals of the invoices were not tendered in court. It was also not established whether the originals existed nor where the copies had been made from.

The question that arose was therefore whether the copies of the invoices satisfied the requirements of mode of proof under ss 64 and/or 65 of the Evidence Act 1950.

It is important to note that the copies of the invoices themselves were not adduced through PW3: see p 4 of the notes of evidence for 29 September 2015. The answer given by PW3 (regarding the document that she had been asked to bring to the trial for the purposes of establishing the fact that payments had been made to the defendant) only related to the extract from the SAP system (the enterprise management system employed by Texas Instruments) and not to the copies of the invoices. As such, there was no evidence led to show that the originals had been destroyed or lost or that the requirements of s 65(1) of the Evidence Act 1950 had otherwise been fulfilled. Accordingly, I found that the copies of the invoices at C/2–5 inadmissible for the reason that they did not fulfil the requirements of the Evidence Act 1950 for the reception of secondary evidence.

**[42]** The plaintiff's failure to prove either the number of foreign workers supplied to Texas Instruments (through the headcount spreadsheet) or the amounts that the defendant had billed Texas Instruments (through the invoices) meant that the plaintiff was not able to establish the revenue that had been obtained by the defendant from Texas Instruments. The plaintiff's claim for his share of the profits purportedly due from Texas Instruments thus failed, even though the costing document for Texas Instruments (at B/78) was categorised as a Part B document, which meant that it was taken as authentic and admissible in evidence.

*STATS ChipPAC*

**[43]** In relation to the plaintiff's claim for his share of the profits attributable to the supply of foreign workers to STATS ChipPAC, I found that the plaintiff was not able to prove the headcount spreadsheet at B/84–85, and hence could not establish the amount of revenue that the defendant had obtained from STATS ChipPAC. No invoices had been tendered in evidence for STATS ChipPAC, nor was any witness from STATS ChipPAC called to testify at trial.

**[44]** The STATS ChipPAC headcount spreadsheet at B/84–85 was a Part C document. The document appeared to have been printed from an Microsoft Excel spreadsheet file, given to the plaintiff via email by someone called Fatin, who appeared to be a staff of STAT ChipPAC. The same analysis as set out in para 41(a) applies here, with the difference that if the document emanated from STATS ChipPAC, then s 21 of the Evidence Act 1950 does not apply. Accordingly, I ruled that this document was inadmissible.

**[45]** The fact that the costing document for STATS ChipPAC was categorised as a Part B document did not assist the plaintiff's case, as he was not able to establish the amount of revenue received from STATS ChipPAC.

WHETHER THE EMPLOYMENT OF THE PLAINTIFF BY THE DEFENDANT TERMINATED THE ORIGINAL AGREEMENT

**[46]** There was no express term providing for the termination of the original agreement in the event that the plaintiff became an employee of the defendant, either in the letter by which the plaintiff was appointed as the chief operating officer or in the original agreement. The question was therefore whether such a term could reasonably be implied into the employment contract, having regard to the duty of fidelity and exclusivity that an employee owes to his or her employer.

**[47]** Under the terms of the original agreement, the plaintiff's share of the profits would be payable for as long as the defendant continued to supply foreign workers to customers that the plaintiff had procured.

**[48]** It has to be borne in mind that the obligation of the plaintiff would have been fully performed under the original agreement once the clients have been procured for the defendant. No further obligation lay on the plaintiff. The defendant on the other hand, would have had to pay the plaintiff's 30% share of the profits earned from the particular client that had been procured by the plaintiff.

**[49]** As none of the obligations of the plaintiff remained executory at the time he had commenced employment with the defendant, I am of the view that there was no conflict between his obligations under the original agreement and

his duties as an employee of the defendant (in particular the duty of fidelity and exclusivity placed on employees). Accordingly, the parties could not have intended for the original agreement to have terminated as a consequence of the plaintiff's appointment as the chief operating officer of the defendant.

**[50]** It follows therefore that the plaintiff's share of the profits under the original agreement were payable even though they may have accrued after the plaintiff had commenced employment with the defendant.

PAYMENTS THAT HAD BEEN MADE BY THE DEFENDANT

**[51]** The plaintiff in his claim acknowledged that the defendant had paid him RM153,016.20. The defendant however maintained that it had paid RM181,867.20 to the plaintiff, but no documentary evidence was produced at trial to prove the payment of the latter sum. I therefore made a finding of fact that the plaintiff had been paid the sum of RM153,016.20 (as pleaded in para 12 in his statement of claim), which was to be deducted from his claim for his share of the profits attributable to the supply by the defendant of foreign workers to AMD (amounting to RM304,435).

**[52]** It was advanced for the defendant that the fact that two of the payment vouchers issued by the defendant to the plaintiff contained the words 'last payment' and 'last and final payment' indicated that the defendant was under no obligation to make any further payment to the plaintiff.

**[53]** The plaintiff's position was that he had accepted the payments on the basis that some payment was better than none at all.

**[54]** In my judgment, the acts committed by the parties after the contract was made cannot be used to construe the contract in order to ascertain whether the parties had intended for the defendant to remain liable for the plaintiff's share of profits. Reid LJ, in the House of Lords decision of *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796, stated:

> I must say that I had thought that it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

**[55]** This decision was applied in Malaysia in the Court of Appeal decision of *Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor* [2010] 4 MLJ 157; [2010] 8 CLJ 49.

**[56]** The liability of the defendant to make payment for the plaintiff's share of the profits has to be determined as a matter of construction of the original agreement, read together with its two supplemental agreements. In my judgment, there is nothing in these documents that suggest that the parties had agreed for there to be any cap on payments. The original agreement, on its true construction, obligated the defendant to make the payment of RM304,435 to the plaintiff as his share of the profits that were attributable to AMD.

DECISION

**[57]** For the reasons set out above, I allowed the plaintiff's claim in part, on the terms set out in para 16 ante.

*Only the claim in respect of AMD was allowed and the defendant was ordered to pay the plaintiff RM151,418.80 with interest thereon at 5%pa from 1 January 2009 till date of judgment and thereafter with post-judgment interest until date of full settlement.*

Reported by Ashok Kumar